No. 00-1472

IN THE

Supreme Court of the United States

ROGER D. COWAN, Warden,

Petitioner,

v.

MARK WILKINSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The procedural default claimed in the instant habeas action is Wilkinson's failure to submit a pro se brief on the merits of his appeal after his appointed counsel filed a *Finley* motion that prayed only for leave to withdraw. The Illinois Appellate Court granted counsel's motion and in the same order affirmed the judgment against Wilkinson without notice to him that it might do so and without giving him the opportunity to file a merits brief. Does Wilkinson's failure to file a pro se merits brief constitute a procedural default?

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REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

The true issues in this case are not those set forth by the Petitioner, Roger D. Cowan, the warden of the state prison in which the Respondent, Mark Wilkinson, is being confined. The holding of the Seventh Circuit Court of Appeals was narrowly drawn: a representative of a state may not claim a procedural default in a federal habeas corpus proceeding when the state appellate court affirmed a judgment against a defendant without giving notice to that defendant that the court might do so and without giving the defendant an opportunity to be heard in regard to the possible affirmance. The issues that Cowan raises — whether, for exhaustion and default purposes, a postconviction petitioner-appellant must be informed of his right to file a response to his appointed counsel's *Finley* motion to withdraw and whether the state appellate court's review of the record in the *Finley* context is a full merits review such that it preserves all issues raised in the trial court for federal habeas purposes — are irrelevant to that holding.

The Public Defender of Cook County, Illinois, who had been appointed to represent Wilkinson for his appeal of the trial court's judgment dismissing his postconviction petition, filed a motion pursuant to *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990 (1987) praying only that she be allowed to withdraw as Wilkinson's counsel. A copy of that motion was served upon Wilkinson who did not file an objection to the Public Defender's withdrawal. Wilkinson was never served notice that any other motion or matter was pending before the court and there was no logical reason for him to believe that the appellate court would rule on anything other

than his attorney's prayer to withdraw. Certainly he had no reason to suspect that the appellate court might, *sua sponte*, consider that prayer an invitation to affirm the judgment of the trial court. That is, however, precisely what the appellate court did; it ruled against Wilkinson on a matter that he never knew was before the court, the court's own unnoticed, unwritten, sub rosa motion to affirm the judgment of the trial court.

The appellate court, then, ruled upon two separate issues affecting Wilkinson when it had only been asked to rule on one. The court first granted Wilkinson's appointed counsel leave to withdraw and the court then proceeded to affirm the judgment of the trial court against Wilkinson. Certainly the Illinois courts consider these to be separate and distinct issues. *See* Illinois Supreme Court Rule 13(c)(2) and *In Re the Marriage of Miller*, 273 Ill. App. 3d 64, 652 N.E.2d 396, 399 (3d Dist. 1995) (wherein the court found "that the letter and spirit of Rule 13 require a 21-day transition period and that nothing prejudicing a client's rights should occur within the 21 days following the allowance of an attorney's withdrawal."). And the separateness of the two issues and Wilkinson's lack of notice that the second issue was under consideration by the court show clearly why the issues that Cowan raises in his certiorari petition are irrelevant here. Cowan has specifically set his issues within the confines of a *Finley* motion for leave to withdraw while the real issue, the one the Seventh Circuit Court of Appeals decided, revolved around what the Illinois Appellate Court did to Wilkinson after it granted his attorney leave to withdraw.

II.

MISSTATEMENTS OF FACT

The substantive issue before the Seventh Circuit was Wilkinson's claim of ineffective assistance of counsel. Cowan argues in his certiorari petition (Cert. Pet. 7) that Wilkinson did not present that claim to the Illinois Appellate Court in that he did not file a pro se response to the Public Defender's motion to withdraw or a pro se brief on the merits of his appeal. Wilkinson's failure to file a response to the withdrawal motion shows only that he did not object to the withdrawal of an appointed attorney who found no appealable issues in his case. It does not show that he intended to abandon his appeal. He may very well have relied upon Illinois Supreme Court Rule 13(c)(2) to enable him to file his appearance and a pro se merits brief or to retain substitute counsel after his appointed counsel had been granted leave to withdraw. So Cowan states the fact that Wilkinson did not file a pro se brief arguing the merits of his appeal but Cowan fails to apprise this Court of the fact that under Illinois law Wilkinson could not legally file such a brief.

A criminal defendant appellant in Illinois has the right to proceed by an attorney or pro se but that appellant cannot engage in a hybrid proceeding where he is both represented and pro se. *People v. Handy*, 278 Ill. App. 3d 829, 664 N.E.2d 1042 (4th Dist. 1996); *People v. Woods*, 292 Ill. App. 3d 172, 684 N.E.2d 1053 (4th Dist. 1997), *appeal denied*, 175 Ill. 2d 553, 689 N.E.2d 1146. Indeed, in *Woods*, the appellate court, on its own motion, struck a pro se brief filed by an appellant who was represented by counsel.

In other words, Wilkinson could not file a pro se appellate brief while he was represented by counsel and he was represented by counsel right up to the moment that the

appellate court entered its order granting the Public Defender's motion to withdraw. But then, at the very moment that the appellate court rendered Wilkinson pro se, which would have enabled him to legally file a pro se brief, the appellate court, in the same order, took away any possibility that Wilkinson could actually submit a pro se brief when the court terminated his appeal by affirming the judgment of the trial court. When Cowan, then, argues that Wilkinson had to file a pro se merits brief to avoid procedural default, he omits the fact that, under Illinois law, Wilkinson could not do the very thing that Cowan disingenuously insists Wilkinson had to do.

An additional misstatement of fact is contained in the opinion of the Seventh Circuit appended to the petition for certiorari. The opinion states that "[a]lthough Wilkinson claims it was not his intent to kill (his wife), that is what he did: she died of strangulation." *Wilkinson v. Cowan*, 231 F.3d 347, 348 (7th Cir. 2000). The cardinal element of Wilkinson's ineffective assistance claim is that the autopsy upon which the state relied to prove a criminal cause of death contained errors of sufficient number and importance to raise the reasonable inference that the autopsy was upon a decedent other than Wilkinson's wife or that the county medical examiner contrived or fabricated the autopsy in whole or part other than conclusions that were obvious from post mortem photographs of the exterior of the body. Given that inference, then, the autopsy and the testimony of the medical examiner based upon it would be invalid as evidence of any cause of death, much less a criminal one. The Court implicitly recognized the significance of the autopsy, *Wilkinson*, *supra* at 349, but then stated that Wilkinson strangled his wife as though it were a proven fact.

In fact, absent an autopsy that is known to a legitimate degree of certainty to be of Gilda Wilkinson, the only

evidence of strangulation was Wilkinson's testimony about the fight with his wife on the night she died. The fight is described in the Seventh Circuit's opinion:

> The argument escalated and, according to Wilkinson, Gilda began to hit him, grabbed his wrist, and then bit into his little finger and refused to let go. In an effort to free himself, Wilkinson says, he fought back — he tripped her, pushed her nose, punched her in the face, and, ultimately, squeezed her neck.

Wilkinson, *supra* at 348. Of course, that scenario *could* indicate a cause of death of strangulation. It is, however, at least as likely, absent a valid autopsy to prove otherwise, that Wilkinson's wife died when, in her attempt to chew off Wilkinson's finger — and she had chewed through his flesh and into the bone — a minute piece of his tissue, a small fragment of bone, tendon, muscle or skin from his finger, either obstructed her larynx or made contact with her vocal chords, thereby inducing acute cardiac arrest. *See* Cyril J. Polson, D. J. Gee and Bernard Knight, *The Essentials of Forensic Medicine*, 4th ed. (Oxford: Pergamon Press, 1985), pp. 351 and 355, discussed in greater detail, with additional forensic medicine authorities, in Wilkinson's brief, pp. 27-29, before the Seventh Circuit Court of Appeals. In fact, Polson, et al., at 355, cite one study in which slightly more than 50% of deaths arising from constriction of the neck were actually due to cardiac arrest. Absent a valid autopsy, then, no cause of death can be stated as fact and certainly, with all deference due to the Seventh Circuit, strangulation cannot be stated as a fact.

The Seventh Circuit is also in error when it states that Wilkinson raised and argued a due process issue that had not been presented in the district court. *Wilkinson*, *supra* at

352, n.1. In fact, the claim of denial of due process was raised in the district court as a sub-issue of the greater issue of procedural default — but, whether as a free-standing issue or as a sub-issue, due process was raised in the district court and discussed in the memoranda that both parties submitted to that court.

The certiorari petition and the Seventh Circuit's opinion appended thereto contain other misstatements of fact but those misstatements appear to be irrelevant to the issue of whether certiorari should be granted or denied. Wilkinson would like to reserve the right to call those misstatements to the Court's attention in the event that certiorari is granted and Cowan then raises issues which would cause those misstatements to become relevant.

III.

ARGUMENT

Cowan, in his certiorari petition, presents two questions for review and then, in support of those questions, argues five reasons as justification for the issuance of a writ of certiorari.

A. COWAN CONTENDS THAT WILKINSON DID NOT PRESENT HIS INEFFECTIVE ASSISTANCE CLAIM TO THE ILLINOIS APPELLATE COURT

Cowan submits that to avoid a procedural default Wilkinson had to have presented his ineffectiveness claim at each level of the state court system. Cowan then contends that Wilkinson failed to present to the Illinois Appellate Court when he did not file, upon being served with his attorney's *Finley* motion, a pro se response to that motion or a pro se brief arguing the substance and merits of his appeal.

As this Court determined in *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S. Ct. 1715 (1992), just as the state courts must afford a petitioner a full and fair hearing on his federal claim, so must that petitioner afford the state courts a full and fair opportunity to address and correct any constitutional errors committed by the state courts in the petitioner's state court case. The state courts need not actually rule on the merits of the federal claim as long as they had the opportunity to rule on the same question raised in the federal habeas petition. *Arrowood v. Clusen*, 732 F.2d 1364 (7th Cir. 1984); *Parker v. Parratt*, 662 F.2d 479 (8th Cir. 1981), *cert. denied*, 459 U.S. 846, 103 S. Ct. 102 (1982). The state courts have had the opportunity to rule on a petitioner's federal claim when the substantial equivalent or the substance of the federal habeas claim has been presented to them. *Picard v. Connor*, 404 U.S. 270, 92 S. Ct. 509 (1971); *Toney v. Franzen*, 687 F.2d 1016 (7th Cir. 1982). And the substantial equivalent or the substance of the federal claim has been presented when the petitioner has submitted both the operative facts and the controlling legal principles to the state courts. *Picard, supra*; *Verdin v. O'Leary*, 972 F.2d 1467 (7th Cir. 1992). More specifically, in order to offer the state courts a fair opportunity to consider a federal claim, a petitioner's submission to the state courts must: (1) rely on pertinent federal cases employing constitutional analysis; or (2) rely on state cases applying federal constitutional analysis to a similar factual situation; or (3) assert the claim in terms so particular as to call to mind a specific federal constitutional right; or (4) allege a pattern of facts that is well within the mainstream of federal constitutional litigation. *Verdin, supra* at 1473-74. Thus can the state courts be alerted to the federal issue and offered a fair opportunity to rule upon the federal claim. Here Cowan never contended in either the federal district or circuit courts that the state courts had not had a full and fair opportunity to rule on Wilkinson's ineffective assistance claim or that Wilkinson hadn't presented the

operative facts and controlling legal principles to the state courts. (E.g., Wilkinson's postconviction petition, which was before both the Illinois trial and appellate courts, may itself have satisfied the third or fourth *Verdin* criteria.) Instead, Cowan contended only that Wilkinson did not argue the substance of the federal habeas claim in a pro se brief to the state appellate court.

More significantly, Cowan does contend that Wilkinson's failure to file pro se objections to his attorney's *Finley* motion or a pro se brief arguing the merits of his appeal in and of themselves constitute a procedural default. Those contentions, however, are without merit. As discussed supra, Wilkinson's failure to file a response to his attorney's withdrawal motion indicates only that he did not object to said attorney's withdrawal and his failure to file a pro se brief signifies solely that he could not legally file a pro se brief before his attorney had been granted leave to withdraw and he could not file a pro se brief after his attorney had been granted leave to withdraw because the appellate court had terminated his appeal when it affirmed the lower court's judgment in the same order in which it granted his attorney leave to withdraw.

Certainly, Wilkinson had no reason to believe, no notice, no indication whatsoever, that the Illinois Appellate Court contemplated anything other than allowing the Public Defender to withdraw as his appointed counsel. Just as certainly, he should have been able to rely upon the appellate court's compliance with Illinois Supreme Court Rule 13(c)(2). Cowan seeks to direct this Court's attention away from the foregoing points by attempting, in his statement of questions presented for review and in his argument of those questions, to fix everything in the context of the Public Defender's *Finley* motion: (1) is it relevant for federal habeas corpus default purposes that a defendant collaterally

attacking his state court conviction was not informed of his right to file a response to appointed counsel's motion to withdraw? and (2) is a state appellate court's review of the record for the purpose of ruling upon appointed counsel's motion to withdraw a full merits review that preserves all issues raised in the state trial court? Wilkinson, though, did not and does not object to the Public Defender being allowed to withdraw as his attorney. He did and does, however, strenuously object to what the appellate court did after it allowed the Public Defender to withdraw. The court affirmed the judgment against him without notice to him that it might do so and thus deprived him of any opportunity to be heard on the merits of his appeal and, contrary to Cowan's implication, a response to appointed counsel's motion for leave to withdraw is simply not the same as a full merits brief arguing the substantive issues in one's appeal.

Surely a court of law contemplating, apparently sua sponte, such drastic action against a party should have to notify that party of the court's contemplations so that the party might have an opportunity to dissuade the court. Notice and the opportunity to be heard are, after all, at the very foundation of our legal system. As this Court stated in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656-7 (1950),

> [m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and the opportunity for hearing appropriate to the nature of the case.

When an adjudication might be harmful to an individual's substantial interests, notice and hearing must measure up to

the standards of due process. *Mullane*, *supra*; *United States v. Cupples*, 112 F.3d 318 (8th Cir. 1997). As this Court also said in *Mullane*, notice must afford a reasonable time for an interested party to present his objections to the proposed action and the right to present objections, the right to be heard, has little, if any, worth unless that party is informed that the matter is pending so that he can timely choose whether to acquiesce or contest. *Mullane*, 339 U.S. at 314, 70 S. Ct. at 657.

Wilkinson was given notice of his attorney's *Finley* motion but he was never given notice that the appellate court might decide his appeal against him at the same time that it ruled on that motion. Cowan, however, contends that notice to Wilkinson that the judgment against him might be affirmed when the appellate court ruled on his lawyer's *Finley* motion was not required because "[t]here was no indication in *Finley* that the defendant had been notified of counsel's conclusion (that he found no meritorious issues in the case) before the appellate [sic] court dismissed the appeal [sic]." (Cert. Pet. 9.) Once again, Cowan confuses the issue here. The petitioner in *Finley* may not have been given notice of her attorney's efforts to withdraw as her counsel (*see*, *e.g.*, *Finley*, 481 U.S. at 566, 107 S. Ct. at 1999, Brennan dissenting) but there is no indication anywhere in *Finley* that she was not given notice that the court, on its own motion or on any other basis, might dismiss her postconviction petition.

Finally, regarding presentment of the ineffective assistance claim, Cowan argues that Wilkinson affirmatively disavowed the claim through the Public Defender's statement in her motion to withdraw that the postconviction petition "failed to allege any facts which give rise to a claim of constitutional deprivation . . ." (Cert. Pet. 7.) The Public Defender was, of course, officially Wilkinson's legal representative until the appellate court granted her leave to

withdraw but once the Public Defender filed her *Finley* motion she effectively ceased being Wilkinson's advocate. Her advocacy from that point on was directed toward furthering her own interest of being let out of the case and that interest could only be advanced by arguing against her client's interest of having his appeal briefed and argued on the merits. *See Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 2555 (1975) cited in *Finley*, *supra*, 481 U.S. at 569, 107 S. Ct. at 2000 (Brennan dissenting). It is well settled that a client is entitled to counsel whose undivided loyalties lie with that client and that an actual conflict of interest arises between a client and his attorney once that attorney has made a choice to advance his own interests to the detriment of his client's interests. *Stoia v. United States*, 109 F.3d 392 (7th Cir. 1997); *Gray-Bey v. United States*, 156 F.3d 733 (7th Cir. 1998).

Certainly, Cowan cites no authority for the proposition that a client is bound by statements made by his attorney in furtherance of that attorney's interests in a *Finley* motion. And *Finley* itself indicates the opposite. If Finley had indeed been bound by her lawyer's representation to the court that her case contained no arguable issues, her case would have ended there. Instead, however, this Court determined that a court presented with a *Finley* motion must independently review the record to assure itself that the attorney's assertions are correct.

B. COWAN CONTENDS THAT A PRO SE DEFENDANT'S LACK OF LEGAL KNOWLEDGE DOES NOT EXCUSE A PROCEDURAL DEFAULT

Cowan cites numerous cases in his attempt to support this contention but neither the contention itself nor the citations are relevant to the Seventh Circuit's ruling.

Initially, Cowan's contention assumes a major premise that is not true. Wilkinson's failure to file a pro se brief arguing the merits of his appeal was not due to a lack of legal knowledge on his part but was, rather, due to the Illinois Appellate Court's failure to comply with the United States Constitution and the laws of the State of Illinois. It was the appellate court, after all, that violated constitutional requirements of due process when it refused to send Wilkinson any notice at all that upon its own unwritten, sub rosa motion it intended to affirm the lower court's judgment against him. It was the appellate court that violated the rules of its own supreme court when it granted Wilkinson's attorney leave to withdraw and then refused to grant Wilkinson the required minimum of 21 days to retain substitute counsel or to file his own appearance and proceed pro se. It was the appellate court that deprived Wilkinson of his opportunity to be heard on the merits of his appeal when, knowing full well that under Illinois law he could not file a pro se brief while he was represented by counsel and also knowing that the Public Defender had effectively ceased to be his advocate when she filed her *Finley* motion, the court granted the Public Defender leave to withdraw, which would have enabled Wilkinson to proceed pro se, but then instantaneously took away his opportunity to proceed at all when it terminated his appeal in the same order. It wasn't, then, Wilkinson's lack of legal knowledge that prevented him from filing a pro se appellate brief. He did everything that the appellate court did not keep him from doing to advance the claims specified in his postconviction petition. It was, instead, the appellate court's multiple violations of federal and state law that prevented Wilkinson from filing a merits brief. And now Cowan prays this Court to sanction those violations of law by granting certiorari and then proclaiming that the illegal is now legal and Wilkinson should indeed be found in procedural default for not filing a brief when, in fact, the Illinois Appellate Court prevented him from filing one.

C. COWAN CONTENDS THAT AN APPELLATE COURT'S REVIEW OF THE RECORD FOR THE SPECIFIC LIMITED PURPOSE OF CONSIDERING COUNSEL'S MOTION TO WITHDRAW IS NOT A FULL MERITS REVIEW THAT PRESERVES EACH ISSUE RAISED IN THE TRIAL COURT FOR FEDERAL HABEAS CORPUS PURPOSES

The obvious response to this contention is that the Illinois Appellate Court's review of the record was not for the sole purpose of determining the *Finley* motion. The review of the record was also for the purpose of disposing of the appeal itself, if necessary, after the court disposed of counsel's motion to withdraw. The Seventh Circuit recognized as much when it stated that "[t]he state appellate court, *when it elected to affirm the circuit court's judgment outright*, . . . implicitly reached the merits of all issues (Wilkinson) had raised in his post-conviction petition." *Wilkinson*, *supra* at 348; emphasis added. It was certainly clear to the Seventh Circuit, if not to Cowan, that the Illinois Appellate Court reached the merits of the issues raised in the postconviction petition for habeas corpus purposes when it affirmed the trial court's judgment rather than when it granted the Public Defender's *Finley* motion. Thus, even if, arguendo, Cowan's contention is absolutely correct and a review of the record for the purposes of determining a *Finley* motion is not a full merits review of the record, his contention does absolutely nothing to show that the Seventh Circuit is in error because that Court did not base its determination of this issue on what happened in the context of the *Finley* motion. It based its determination on what happened after the *Finley* motion had been decided.

The propriety of the Seventh Circuit's holding that the appellate court had reached the merits of Wilkinson's claims is further supported by state law. In Illinois, when an appellant fails to file a brief, the appellate court has the

discretion to dismiss the appeal or to consider the case on its merits. *Webb v. Swick*, 24 Ill. App. 3d 780, 321 N.E.2d 375 (1st Dist. 1974); *People v. Zakarian*, 121 Ill. App. 3d 968, 460 N.E.2d 422 (1st Dist. 1984). Here, the Illinois Appellate Court did not dismiss Wilkinson's appeal for failure to file a brief or for any other reason but, instead, affirmed the judgment of the trial court. Even when litigants fail to file briefs, the Illinois appellate courts "prefer to decide cases on their merits, and seek to avoid determinations based on procedural or rule violations or omissions." *Brantley v. Delnor Hospital, Inc.*, 120 Ill. App. 2d 185, 256 N.E.2d 369, 373 (2d Dist. 1970); *Application of County Collector*, 3 Ill. App. 3d 245, 278 N.E.2d 843 (1st Dist. 1971). The reason for the preference is that "the ends of justice are better served if litigation is determined according to the substantive rights of the parties and not by procedural default." *Lynch v. Wolverine Insurance Company*, 126 Ill. App. 2d 192, 261 N.E.2d 466, 466 (1st Dist. 1970); *Illinois Structural Steel Corporation v. Pathman Construction Company*, 23 Ill. App. 3d 1, 318 N.E.2d 232 (1st Dist. 1974). When one of the litigants has failed to file a brief, the appellate court's review of the trial court record is a necessary pre-condition to deciding the appeal upon its merits. *Hull v. City of Griggsville*, 29 Ill. App. 3d 253, 330 N.E.2d 293 (4th Dist. 1975). An examination of the record, then, is for the purposes of determining the merits of the appeal. *Russell v. License Appeal Commission of the City of Chicago*, 133 Ill. App. 3d 594, 273 N.E.2d 650 (1st Dist. 1971). And that is what the appellate court did here; it examined the record and then it determined Wilkinson's appeal on the merits.

Additional indication, if any is needed, that the Illinois Appellate Court's review of the record was for the purpose of determining the merits of the appeal is the court's failure to comply with the dictates of this Court in *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546 (1991) and *Harris v. Reed*, 489 U.S. 255, 109 S. Ct. 1038 (1989). In *Coleman*, this

Court noted that a federal court generally may not review a state court's denial of a defendant's federal constitutional claim if the state court's decision rested upon a state procedural default that was independent of the federal constitutional question and was adequate to support the defendant's continued custody. For example, the failure to timely file a state notice of appeal would serve as an independent and adequate ground sufficient to bar federal habeas review. To resolve any difficulty that might arise in the application of the "independent and adequate state ground" rule, the Court in *Coleman* created a conclusive presumption that the state may not rely upon a procedural default in a federal habeas action unless the state court clearly and expressly relied on such a ground in its decision.

This Court had previously declared in *Harris*, *supra*, cited in *Coleman*, *supra*, that a state court's reliance upon an independent and adequate state ground must be clear from the face of the state court's opinion itself. In *Harris*, the state appellate court had opined that the defendant, who was appealing the denial of his postconviction petition, had waived all but one of his postconviction issues by not presenting them on direct appeal. Nonetheless, the appellate court then went on to consider and reject all of Harris's claims on their merits. Reviewing the denial of Harris's federal habeas corpus petition, the Court of Appeals for the Seventh Circuit held that Harris's claims were procedurally barred. This Court reversed, noting that "a state court that wishes to rely on a procedural bar in a one-line pro forma order easily can write that 'relief is denied for reasons of procedural default.' " *Harris* 489 U.S. at 266, 109 S. Ct. at 1045. If a state court chooses not to so state, the Court added, then there is no basis for a federal habeas court to refuse to consider the merits of the federal claim.

It is clear, then, that the Seventh Circuit was correct when it found that the Illinois Appellate Court had reached the merits of the issues that Wilkinson had raised. The state court never

mentioned the failure to submit a brief as the basis for its decision. It said that it had reviewed the record and it then affirmed the trial court's judgment. In other words, it held to the policy of Illinois courts of appeal to decide cases on their merits rather than on procedural rule violations or omissions.

D. COWAN CONTENDS THAT THE SEVENTH CIRCUIT FOUND THAT A *FINLEY* MOTION MAY PRESERVE, FOR HABEAS REVIEW, MORE ISSUES THAN AN APPELLATE BRIEF

Yet once more Cowan seeks to misdirect this Court's attention away from what the Illinois Appellate Court did to Wilkinson after it granted his attorney's *Finley* motion. In fact, the Seventh Circuit did not find that the *Finley* motion preserved all issues raised in the state trial court for procedural default purposes. That Court did find, however, that it was the state appellate court's review of the record and its affirmance of the trial court's judgment on the merits that preserved the claims raised by Wilkinson in his postconviction petition. *See Wilkinson*, *supra* at 351.

Cowan argues that the Seventh Circuit's opinion forces state appellate courts to perform full merits reviews of issues not briefed on appeal. (Cert. Pet. 17.) In fact, the Seventh Circuit's *Wilkinson* decision forces state appellate courts to do nothing. If anything, it merely encourages them to comply with the "notice and opportunity to be heard" provisions of the United States Constitution because if they do not other state agents may not be able to claim procedural defaults against federal habeas petitioners. After all, had the Illinois Appellate Court complied with the Constitution rather than violating it by failing to give Wilkinson notice and an opportunity to present his objections to the court's impending decision to affirm the judgment against him, the Seventh Circuit would not have had the occasion to write the opinion to which Cowan now objects.

E. COWAN CONTENDS THAT THE SEVENTH CIRCUIT OFFENDS THE DOCTRINE OF COMITY

The Seventh Circuit's opinion is offensive here, Cowan lastly contends, because state courts that "conduct the proper limited frivolity analysis of a constitutional claim in a *Finley* situation may lose their comity-based privilege to perform a full merits analysis of any issues which a defendant did not present to them, but which he or she later presents in a federal habeas petition." (Cert. Pet. 16-17.) There are initially two obvious responses to this contention. First and frequently stated supra, the "analysis of a constitutional claim" complained of here was not performed in "a *Finley* situation." The Illinois Appellate Court performed its "proper limited frivolity analysis" and decided to grant the Public Defender's *Finley* motion for leave to withdraw but then the court, pursuant to the policy of Illinois courts of review, *Brantley v. Delnor Hospital, Inc.*, 120 Ill. App. 2d 185, 256 N.E.2d 369 (2d Dist. 1970); *Lynch v. Wolverine Insurance Company*, 126 Ill. App. 2d 192, 261 N.E.2d 466 (1st Dist. 1970), went on to examine and review the record for the purpose of determining Wilkinson's appeal on its merits.

Second, Wilkinson did everything that the Illinois Appellate Court allowed him to do to present his constitutional claim to that court. Wilkinson's alleged failure to present was his failure to file a brief on the merits of his appeal with the appellate court. Only it was the appellate court that prevented him from filing a brief when, subsequent to determining the *Finley* motion but in the same order, it affirmed the judgment of the trial court without giving Wilkinson any notice that it might do so. Thus, the appellate court, which knew — or, at the very least, certainly should have known — that under Illinois law Wilkinson could not file a pro se merits brief while he was represented by counsel, precluded him from filing a brief at all by terminating his appeal as soon as it had rendered him pro se.

If, then, the only avenue by which the Illinois Appellate Court could consider the merits of Wilkinson's constitutional claims was by his submission of a merits brief — a premise that underlies Cowan's entire case here — the court itself blocked that thoroughfare. The Illinois Appellate Court could easily have given Wilkinson the opportunity to prepare and file a merits brief but it chose instead to violate the United States Constitution and Illinois law to deny him that opportunity. If comity may be defined as the principle by which the courts of one jurisdiction will give effect to the judicial decisions of another out of deference and respect, *Black's Law Dictionary*, rev. 4th ed. (St. Paul, Minn: West Publishing Co., 1968), then the Seventh Circuit did not tread at all upon any state's "comity-based privileges" when it refused to find a procedural default in a situation where a state appellate court did virtually everything that it could to deny an appellant the opportunity to argue his appeal through the vehicle of a merits brief and, additionally, to deny itself the opportunity to determine his appeal upon a full briefing of the issues in that appeal. *See Arrowood v. Clusen*, 732 F.2d 1364 (7th Cir. 1984); *Parker v. Parratt*, 662 F.2d 479 (8th Cir. 1981), *cert. denied*, 459 U.S. 846, 103 S. Ct. 102 (1982).

F. THE DECISION OF THE SEVENTH CIRCUIT MAY BE SUPPORTED ON ALTERNATIVE GROUNDS

Assuming arguendo that the Seventh Circuit's opinion is in error for all of the reasons that Cowan advances in his petition for certiorari, the decision itself is still correct on the alternative ground that the Illinois Appellate Court, as discussed, *supra*, violated Wilkinson's right not to be deprived of life or liberty without due process of law.

CONCLUSION

Cowan prays this Court to grant his petition for a writ of certiorari because, he says, the Seventh Circuit's opinion has far-reaching implications and sets a dangerous precedent in an important area of federal habeas corpus law. (Cert. Pet. 17.) Perhaps that forewarning of unspecified horribles to come might be more compelling had Cowan correctly represented the issues he presents to this Court. Because Cowan has not accurately represented the instant case, the authorities he cites are not in conflict with the Seventh Circuit's decision here. In fact, neither Wilkinson's case nor the Seventh Circuit's opinion as they actually exist will have far-reaching implications or be a dangerous precedent.

First, the opinion here is too fact-bound to have the impact that Cowan predicts. The Seventh Circuit said as much: "In view of the *particular way* in which the Illinois appellate court disposed of Wilkinson's post-conviction appeal, however, we do not believe that he procedurally defaulted the ineffectiveness claim." *Wilkinson*, *supra*, at 350; emphasis added. Moreover, the procedure that the appellate court followed in Wilkinson does not appear to be the typical procedure of Illinois courts of review. In *People v. Lee*, 251 Ill. App. 3d 63, 621 N.E.2d 287, 288 (1993), for example and as noted by the Seventh Circuit, the appellate court stated that

> "[c]ounsel requested that this court grant petitioner a reasonable opportunity to show cause why the appeal should not be dismissed or the judgment affirmed for lack of merit and why the office of the State Appellate Defender should not be allowed to withdraw as counsel on appeal. The clerk of this court advised petitioner that he had 30 days in which to respond to the motion and in which he could file any additional matters of merit."

Wilkinson, *supra* at 351. In *Lee*, then, the appellant was notified that more was pending before the state appellate court than

appointed counsel's prayer to withdraw and he was further notified that he had an obligation to respond concerning the merits of the case. Pretty much the only similarity between *Lee* and *Wilkinson* is that the pertinent state court rulings were both made by panels of the Illinois Appellate Court. Certainly, Cowan has failed to cite any case to show that the state appellate procedure that the Illinois Appellate Court applied to Wilkinson is common — or, indeed, that it has been applied to any other appellant at all.

Second, the opinion of the Seventh Circuit is far too narrowly drawn and confined by the particular facts of this case to be dangerous. The Seventh Circuit's opinion holds only that a representative of a state may not claim a procedural default in a federal habeas corpus proceeding when the state appellate court affirmed a judgment against a defendant without giving notice to that defendant that the court might do so and without giving the defendant an opportunity to be heard in regard to the possible affirmance. The Seventh Circuit would, in all likelihood, have set a much more dangerous precedent had it accepted Cowan's contention about the procedure to be followed in this case. In that event, a state appellate court could effectively prevent any appellant whose counsel filed a *Finley* motion from ever being granted federal habeas corpus relief by the simple expedient of granting the *Finley* motion and affirming the judgment against the appellant without ever allowing that appellant to go beyond the statement of withdrawing counsel that there are no arguable issues in the appeal. It could very logically be argued, then, that the Seventh Circuit by its *Wilkinson* opinion may have prevented the "*Wilkinson* procedure" from becoming a more common procedure in state appellate proceedings.

For the foregoing reasons, the Respondent herein, Mark Wilkinson, prays that Roger D. Cowan's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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